LIBRARY
SUPREME COURT. U. S.

FILED
JUN 23 1958
JOHN T. FEY, Clerk

No. 1023

In the Supreme Court of the United States

OCTOBER TERM, 1957

EDWARD PETER CALLAS, an Infant Under the Age of Fourteen Years, by HELEN CALLAS, His Guardian ad Litem, and EDWARD GEORGE CALLAS, PETITIONERS

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

GEORGE COCHRAN DOUB,
Assistant Attorney General,

SAMUEL D. SLADE,
HERBERT E. MORRIS,
Attorneys,
Department of Justice,
Washington 25, D. C.

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 1023

EDWARD PETER CALLAS, an Infant Under the Age of Fourteen Years, by HELEN CALLAS, His Guardian ad Litem, and EDWARD GEORGE CALLAS, PETITIONERS

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of New York (R. 20-23) is reported at 152 F. Supp. 17. The opinion of the United States Court of Appeals for the Second Circuit, the concurring opinion of Hincks, J., and the dissenting opinion of Lumbard, J. (Pet. App. 6-18), are not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 1, 1958. The petition for a writ of certio-

rari was filed on May 26, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the island of Kwajalein, administered by the United States pursuant to the provisions of a United Nations trusteeship agreement, is a foreign country within the meaning of the exception to the Federal Tort Claims Act set forth in 28 U.S.C. 2680(k).

STATUTE INVOLVED

28 U.S.C. 2680 provides in pertinent part:

> § 2680. *Exceptions.*
>
> The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> * * * *
>
> (k) Any claim arising in a foreign country.
>
> * * * *

STATEMENT

1. *The status of the island of Kwajalein.* The island of Kwajalein, one of the Marshall Islands, was occupied by United States armed forces in 1944 (Pet. App. 7). Prior to that time, Kwajalein had been under Japanese mandate in accordance with Article 22 of the Covenant of the League of Nations. Military occupation of the island continued until July 18, 1947, when the former Japanese mandated islands, including Kwajalein, became a trust territory under the trusteeship system provided by Article 75 of the Charter of the United Nations, with the United States designated as administering authority. See Trustee-

ship Agreement for the Former Japanese Mandated Islands, 61 Stat. 3301, approved by the Joint Resolution of Congress of July 18, 1947, 61 Stat. 397. Kwajalein, at the time of the accident here involved, was, and still is, a trust territory administered by the United States pursuant to the terms of the United Nations trusteeship agreement (R. 22-23).

2. *The proceedings below.* On February 20, 1955, the petitioner Edward Peter Callas, son of a naval officer stationed on Kwajalein, was injured when a round of ordnance exploded in his hand (R. 4). He had found the shell on a Kwajalein beach where it had been apparently washed up after failing to detonate in the course of military operations during World War II (R. 4). The petitioners, residents of Brooklyn, New York, brought an action under the Federal Tort Claims Act in the United States District Court for the Eastern District of New York, alleging negligence on the part of agents of the United States with regard to the explosion (R. 3-6).

The District Court granted the Government's motion for summary judgment and dismissed the complaint on the ground that Kwajalein is a foreign country within the meaning of 28 U.S.C. 2680(k), *supra*, p. 2 (R. 20-21). The Court of Appeals for the Second Circuit, Lumbard, J., dissenting, affirmed the decision of the District Court (Pet. App. 6-18).

ARGUMENT

The petitioners seek recovery under the Federal Tort Claims Act for injuries suffered by Edward Peter Callas on the island of Kwajalein. The basic

issue presented by their petition is whether Kwajalein is a foreign country within the meaning of 28 U.S.C. 2680(k) (*supra*, p. 2). This Court has once before been concerned with this clause and concluded that it related the Tort Claims Act to this country's sovereignty and that it reaffirmed the general canon of statutory construction according to which "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *United States* v. *Spelar*, 338 U.S. 217, 219, 222. Under this ruling and the decisions of the lower courts,[1] it is clear that Kwajalein is excepted by the Act and that the rulings below holding the island to be a foreign country within the meaning of 28 U.S.C. 2680(k) are correct. Hence, there is no occasion for further review by this Court.

1. In *United States* v. *Spelar*, this Court ruled that under the provisions of the Federal Tort Claims Act excepting claims arising in a foreign country "the coverage of [the statute] was geared to the sovereignty of the United States".[2] 338 U.S. 217, 219. The powers exercised by the United States in admin-

---

[1] *E.g.*, *Burna* v. *United States*, 240 F. 2d 720 (C.A. 4); *Cobb* v. *United States*, 191 F. 2d 604 (C.A. 9), certiorari denied, 342 U.S. 913; *Brewer* v. *United States*, 79 F. Supp. 495 (N.D. Cal.); *Brunell* v. *United States*, 77 F. Supp. 68 (S.D. N.Y.); cf., *Ugeno* v. *Acheson*, 96 F. Supp. 510, 515 (W.D. Wash.).

[2] See also *Burna* v. *United States*, *supra*, note 1 at 722; *Cobb* v. *United States*, *supra*, note 1 at 607-608; *Brewer* v. *United States*, *supra*, note 1 at 496; *Brunell* v. *United States*, *supra*, at 71-72.

istering Kwajalein, however, are exercised solely in the capacity of a trustee designated by the United Nations under the provisions of the trusteeship agreement (61 Stat. 3301). Moreover, the Department of State has expressed the view that the United States does not have sovereignty over the former Japanese mandated islands by virtue of the trusteeship agreement.[3] The extent of the sovereignty of the United States is basically a political question, the determination of which by the executive branch is conclusive in the courts. *Jones* v. *United States*, 137 U.S. 202; *Pearcy* v. *Stranahan*, 205 U.S. 257; *Ludecke* v. *Watkins*, 335 U.S. 160.

As observed by Judge Hincks below, the lack of sovereignty in the United States in administering Kwajalein is made plain by the provisions of the trusteeship agreement. Under Article 13, the United States agreed that Articles 87 and 88 of the United Nations Charter (59 Stat. 1050-1051) should be applicable. Under those articles, the administering authority submits to the Security Council of the United Nations, under its direction, annual reports of the "political, economic, social and educational advancement of the inhabitants of the trust territory." Such responsibility to a higher authority in supervising the development of a trust territory in accordance with policies outlined in the trusteeship agree-

[3] See *Brunell* v. *United States*, 77 F. Supp. 68, 70 (S.D. N.Y.), where this view is evidenced in a letter from the Secretary of State to the Attorney General. See also Sayre, *Legal Problems Arising from the United Nations Trusteeship System*, 42 Amer. Journal of Internat'l Law 263, 271 (1948).

ment and the United Nations Charter is clearly inconsistent with the claim that the administering authority is sovereign over the trust territory.[4]

The determination below of a lack of sovereignty in the United States is in accord with the decisions concerning the application of the Tort Claims Act to our military occupation of Okinawa. *Cobb* v. *United States*, 191 F. 2d 604 (C.A. 9), certiorari denied, 342 U.S. 913; *Burna* v. *United States*, 240 F. 2d 720, 721 (C.A. 4). In *Cobb*, the United States controlled Okinawa by virtue of its military occupation; in *Burna*, Okinawa was held under a treaty of peace with Japan conferring rights on the United States "to exercise any and all powers of administration, legislation and jurisdiction." Despite this unsupervised control, exercised without responsibility to higher authority as in the trusteeship system, the courts held that the United States did not possess sovereignty and that Okinawa was a foreign country. Under these rulings, as stated in the concurring opinion below (Pet. App. 11), "*a fortiori* is Kwajalein a foreign country".

2. The petitioners argue that the exception from liability for claims arising in a "foreign country" under the Act is limited to territory in which liability would be governed by the laws of a foreign power, and that these considerations do not apply to Kwajalein where the United States exercises legislative authority.[5] See *United States* v. *Spelar*, 338 U.S. 217,

---

[4] See Sayre, *op. cit. supra*.

[5] Petitioner expressly relies on a letter received from the Director of the Office of Territories of the United States De-

221. This argument misconceives the nature of the duty imposed on the United States under the trusteeship agreement. The United States was not given the authority "to legislate at will, in disregard of the spirit and traditions" of the trust territory (cf. *Cobb* v. *United States*, 191 F. 2d 604, 611). On the contrary, the basic purpose of aiding the people of the trust territory to develop self-government was to be achieved on a foundation of local customs and traditions. There is thus clearly no merit in the petitioners' implied suggestion that the local law of Kwajalein, as it evolved in the past and as it constituted a vital part of the culture to be preserved under the trusteeship system, could be swept away and entirely replaced by American legal concepts. Such a change would not only violate the legitimate interests of the inhabitants of the trust territory as specifically provided for in the trusteeship agreement but would also be in conflict with principles of international law. Cf. *Cobb* v. *United States*, *supra* at 611; *Burna* v. *United States*, 240 F. 2d 720, 722.

In any event, the petitioners' argument is fallacious. Congress did not limit the "foreign country" excep-

---

partment of the Interior, stating (R. 17-18):

> That any law of negligence which may be in force on Kwajalein is contained in the local common law or the British common law as it existed before July 4, 1776.

This letter, when read in its entirety, merely reiterates the duty of the United States under the trusteeship agreement to give "due recognition to the customs of the inhabitants in providing a system of law for the territory." Article 6 (61 Stat. 3301, 3302). It also clearly indicates that the law provided for incorporates legal concepts from many nations.

tion to those situations in which the United States might be subjected to liabilities arising from the laws of a foreign power. While this was a consideration suggested by this Court in *Spelar*, the balance of the opinion indicated that it was merely one of the considerations which caused Congress expressly to limit the application of the Tort Claims Act to the territorial jurisdiction of the United States. *United States* v. *Spelar*, 338 U.S. 217, 222; see also *Burna* v. *United States*, 240 F. 2d 720, 721. Congress buttressed the territorial limitation of the Act by the venue provisions (28 U.S.C. 1402(b)) laying exclusive venue in the United States District Courts in the district in which the plaintiff resides or the tort occurred. The Act does not provide for a court to adjudicate tort claims which occurred outside the territorial limits of the United States (cf. 18 U.S.C. 3238).

If petitioners' theory were correct and the Tort Claims Act applied to Kwajalein, recovery under it would be limited to those instances in which the plaintiff is a resident of the United States. This result, however, would be in conflict with congressional intent that the waiver of sovereign immunity should not turn on fortuitous circumstances such as citizenship. *United States* v. *Spelar*, *supra*, at 220. The result would also be in apparent conflict with Article 8 of the trusteeship agreement (61 Stat. 3301, 3303) providing that the United States, as administrator of the trust territory, "ensure equal treatment to the Members of the United Nations and their nationals in the administration of justice."

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

GEORGE COCHRAN DOUB,
Assistant Attorney General.

SAMUEL D. SLADE,
HERBERT E. MORRIS,
Attorneys.

JUNE 1958.